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In The
Supreme Court of the United States

Eric Eldred, Et Al.,
Petitioners,
v.
John D. Ashcroft, in his official capacity as
Attorney General,
Respondent.

On Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

BRIEF OF MALLA POLLACK, *AMICUS CURIAE* SUPPORTING PETITIONERS

Malla Pollack

Northern Illinois University
College of Law
Normal Road
DeKalb, IL 60115
815-753-1160

after June 20, 2002
University of Memphis
Cecil C. Humphreys School of Law
3715 Central Ave.
Memphis, TN 38152-3140
901-678-2421

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INTEREST OF THE AMICUS CURIAE

Amicus Malla Pollack[1] ("Pollack") is a law professor with no financial interest in the outcome of this litigation. As an expert in the history of Art. I, Sec. 8, cl. 8 of the United States Constitution, the Copyright and Patent Clause, Pollack hopes to bring to the Court's attention information not clearly presented by any other brief. Pollack believes this information supports a strong standard of review for congressional action pursuant to the Copyright and Patent Clause.

AUTHORITY TO FILE

Counsel for petitioner and respondent have consented to the filing of this brief. The consent letters have been filed with the Clerk of the Court.

SUMMARY OF ARGUMENT

The review standard for statutes passed pursuant to the Copyright and Patent Clause of the U.S. Const., Art. I, Sec. 8, cl. 8, should be similar to that used for the Enablement Clause of the Fourteenth Amendment, U.S. Const., Amd. XIV, Sec. 5., as explicated in City of Boerne v. Flores, 521 U.S. 507 (1997); Kimel v. Florida Bd. of Regents, 528 U.S. 62 (2000); United States v. Morrison, 529 U.S. 598 (2000). Original intent for a high standard of review

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1. No part of this brief was authored by counsel for any party to this case. The cost of this filing has been paid in full by Malla Pollack.

is indicated by the detailed fences inserted into the text of the Copyright and Patent Clause. The importance of these textual fences is supported by the ratifying generation's concern with government corruption and by that generation's understanding of the anti-corruption background of the ancestral Statute of Monopolies. The only other constitutional language with similarly constrained text is the Enablement Clause of several later amendments.

The Court should speak more fully than usual on the constitutional issues in this case, because Congress has ignored this Court's repeated, less clear instructions to prioritize public access to "science and the useful arts."

ARGUMENT

Amicus Malla Pollack ("Pollack") writes separately to bring additional points to the Court's attention. Specifically, Pollack argues (i) that the Court should use a high standard of review under the Copyright and Patent Clause, and (ii) that full analysis is appropriate in this case. On the other issues presented, Pollack fully supports the insightful *amicus* brief filed by Jonathan Weinberg on behalf of numerous law professors.

I. The Copyright and Patent Clause Requires Tight Judicial Review of Congressional Action

This Court has not yet formulated a standard of judicial review for congressional action pursuant to the Copyright Power.[2] The text of the Constitution and the basic policy concerns of the drafting and ratifying generation support a high standard of review.

A. Textual Choices Demonstrate Original Intent for Narrow Construction of the Power

The Copyright and Patent Clause[3] is uniquely drafted. No other grant of power in the original Constitution or the early Amendments is as textually constrained. This drafting decision evidences that all the limitations in the Clause were necessary hedges to cabin the power acceptably.[4]

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2. The Copyright Power and the Patent Power are both contained in Art. I. Sec. 8, cl. 8 of the U.S. Const.

("Congress shall have the power . . . To Promote the Progress of Science and useful Arts by securing for limited times to Authors and Inventors the exclusive right to their respective writings and discoveries."), usually referred to as the Copyright and Patent Clause. The Progress Clause would be more appropriate. *See* Malla Pollack, *What Is Congress Supposed to Promote?: Defining 'Progress' in Article I, Section 8, Clause 8 of the United States Constitution, or Introducing The Progress Clause, forthcoming* 80 Nebraska L. Rev. (2002), now available at <http://papers.ssrn.com/sol3/papers.cfm?abstract_id=304180>. (providing empirical evidence of the 1789 meaning of "progress").

3. Since this case deals solely with copyrights, most later references will be to the "Copyright Power" and "Copyright Clause."

4. "We begin with [the Constitution's] text." City of Boerne v. Flores, 521 U.S. 507, 519 (1997)(providing

First, the Clause includes a jurisdictional limit on the *res* as to which Congress may legislate: only the "writings" of "authors" and the "discoveries" of "inventors."

Second, the Clause specifies that Congress may pass statutes for one, and only one policy goal, "to promote the

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Court's starting place for determining scope of Congress' power under Fourteenth Amendment); *see also, e.g.,* Printz v. United States, 521 U.S. 898, 905 (1997) (Scalia, J.) (looking at history only after explaining the absence of any constitutional text precisely on point); Laurence H. Tribe, *Taking Text and Structure Seriously: Reflections on Free-Form Method in Constitutional Interpretation*, 108 Harv. L. Rev. 1221, 1236 (1995) (arguing that proper interpretation of the Constitution "put[s] . . . great emphasis upon text and structure, both the structure within the text – the pattern and interplay in the language of the Constitution itself and its provisions – and the structure (or architecture) outside the text – the pattern and interplay in the governmental edifice that the Constitution describes and creates, and in the institutions and practices it propels."); *see also* Akhil Reed Amar, *Intratextualism*, 112 Harv. L. Rev. 747, 748 (1999)(calling for "intratextualism" which "tries to read a contested word or phrase that appears in the Constitution in light of another passage in the Constitution featuring the same (or a very similar) word or phrase."). *See generally* Malla Pollack, *Dealing with Old Father William, or Moving from Constitutional Text to Constitutional Doctrine: Progress Clause Review of the Copyright Term Extension Act, forthcoming* Loyola of L.A. L. Rev. (Fall 2002) (providing fuller explication of the text-based argument for strong review under Art. I, Sec. 8, cl. 8, the Progress Clause.).

progress of science and useful arts."

Third, the Clause specifies the means Congress may use: providing "exclusive rights" for mere "limited times."[5] The plural "times" does not undermine the extreme narrowness of the Power. "Times" allows for (i) different pre-set terms for different types of statutory rights, and (ii) pre-set terms divided into original and renewal terms.[6] The

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5. Congress may also support the arts and sciences through the Spending Power. *See* National Endowment for the Arts v. Finley, 524 U.S. 569, 588 (1998)("Congress has wide latitude to set spending priorities"; upholding facial validity of NEA funding criteria). However, the Necessary and Proper Clause may not be used to "adopt measures which are prohibited by the Constitution" or "pass laws for the accomplishment of objects not intrusted to the government." M'Culloch v. Maryland, 17 U.S. 316, 423 (1819). The Commerce Clause may not be used to by-pass a limit in the text of another Article I power. *See* Railway Labor Executives Ass'n v. Gibbons, 455 U.S. 457, 465 (1982) (refusing to allow Commerce Clause by-pass of uniformity limit in Bankruptcy Clause). Nor may the Treaty Power be used by-pass a textual fence blocking Congress' power. *See* Paul J. Heald & Suzanna Sherry, *Implied Limits on the Legislative Power*, 2000 Univ. of Il. L. Rev. 1119, 1181-82 (explaining).

6. *See* Tyler T. Ochoa, *Patent and Copyright Term Extension and the Constitution: A Historical Perspective*, 49 J. Copyr. Soc'y USA 19, 102 (2002) (supporting same construction). During the era of formalities, most works were not renewed. The effective term limit was, therefore,

bargain theory of intellectual property requires terms to be set *ex ante*.[7] The *quid pro quo* principle, or bargain theory of intellectual property, prevents the type of corruption the Framers recognized in earlier British practice, as discussed *infra* Section I.B.

No other Article One Power is as textually constrained. As a textual matter, therefore, this Court should require Congress to abide by each and every limitation. Respect for the Constitution's writtenness requires strong judicial review.

The Court of Appeals decided the constitutionality of the Copyright Term Extension Act[8] ("CTEA") pursuant to the Copyright Power by the most deferential form of rational

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much shorter than if the entire allowable period was granted in one block of time. *See* Barbara Ringer, Study No. 31: Renewal of Copyright 187 (1960) (concluding only 15% of registered copyrights were renewed), *reprinted in* Subcomm. on Patents, Trademarks, and Copyrights of the Senate Comm. on the Judiciary, 86th Cong., 1st Sess., Copyright Law Revision (Comm. Print 1960).

7. *See* Heald & Sherry, *supra* note 5, at 1162-64 (locating *quid pro quo* principle embedded in Clause); Pollack, *What is Congress Supposed to Promote?*, supra note 2, at 13-14 (applying bargain theory to copyright); Malla Pollack, *The Owned Public Domain*, 22 Hastings Comm/Ent 265, 291-92 (2000) (providing authorities for bargain theory of patent).

8. Pub. L. No. 105-298, 112 Stat. 2827 (1998).

basis review.[9] The Constitution's text demonstrates the inappropriateness of such lax review. The paradigm of rational basis review is an economic measure of general applicability passed pursuant to the Commerce Clause which is alleged to have violated the equal protection rights of an historically unthreatened group.[10] The Commerce Clause, however, lacks any internal textual restraint on either means or goals. Even the jurisdictional limit of the Commerce Power is both immense and vague. Compare the current "Congress shall have the power . . . to regulate commerce . . . among the several states," with the somewhat narrower hypothetical clause, "Congress shall have the power . . . To promote a civil, agrarian society, by regulating Commerce . . . among the several states." This hypothetical adds only one of the several textual constraints located within the Copyright Clause. A goal is set, but the allowed means are not stated

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9. *See* Eldred v. Reno, 239 F.3d 372, 380 (D.C. Cir. 2001) (holding that Congress' choice of copyright terms "is subject to judicial review only for rationality."); Eldred v. Ashcroft, 255 F.3d 849, 854 (D.C. Cir. 2001)(Sentelle, J., dissenting from denial of petition for rehearing en banc) ("Contrary to my colleagues, I do not accept that it is sufficient for Congress to merely articulate some hypothetical basis to justify the claimed exercise of an enumerated power.").

10. *See* Kimel v. Florida Bd. of Regents, 528 U.S. 62, 3 (2000) (stating that age discrimination claims are subject to mere rational basis scrutiny because "[o]lder persons . . have not been subjected to a history of purposeful unequal treatment.") (citation and internal quotation marks omitted).

even generally. No express time constraint is imposed. In stark contrast, the Copyright Clause specifies a single goal, allows only one tightly cabined means which may be deployed only for "limited times," and provides a sharp jurisdictional limit (only "writings" of "authors" and "discoveries" of "inventors").

In sum, the uniquely detailed text of the Copyright Clause demonstrates that its drafters considered its possible misuse and decided not to allow Congress this power without multiple textual constraints. As a textual matter, therefore, the Copyright Power demands review at a much higher standard than that given mere commercial regulation.

Other basic concerns support a high review standard in the Copyright Clause issue of this case.

First, the review standard is generally raised when the statute in question is *targeted* at the intended area of protection.[11] The CTEA targets the "writings" of "authors." It has no more general applicability.

Looking at the Constitution structurally, the text separates out for unusual constraint congressional power over "writings" and "discoveries." If the only intent had been to allow national treatment of such *res* regardless of interstate connection, the Clause would give "Congress the power . . . to promote writings and discoveries." The textual difference between this hypothetical and the actual language of the

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11. *See, e.g.*, Turner Broadcasting Sys. v. FCC, 512 U.S. 622, 640-41 (1994) ("laws that single out the press, or certain elements thereof, for special treatment pose a particular danger of abuse by the State and so are always subject to at least some degree of heightened First Amendment scrutiny.") (citations and internal quotation marks omitted).

Copyright Clause demonstrates that copyright statutes should not be treated as mere economic regulation. Madison, after all, saw no need for the First Amendment's speech and press clauses[12] despite his clear understanding that republican government required an educated, informed populace.[13] The Copyright Power is textually limited to force it into its proper role as an "engine of free expression."[14] The Copyright Clause is the pre-First Amendment First Amendment.

In the Constitution, the only textual structure comparable to the Copyright Clause is the enabling language repeated almost verbatim in eight amendments.[15] These

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12. *See* The Federalist Papers (no. 38, James Madison); *see also id.* (No. 84, Alexander Hamilton) ("For why declare that things shall not be done which there is no power to do? Why, for instance, should it be said that the liberty of the press shall not be restrained, when no power is given by which restrictions may be imposed?").

13. *See* Letter from James Madison to W.T. Berry (Aug. 4, 1822), *in* James Madison, The Complete Madison 337 (Saul K. Padover ed. 1953) ("Knowledge will forever govern ignorance"; "[a] popular government without popular information[] or the means of acquiring it is but a prologue to a farce or a tragedy or perhaps both.").

14. Harper & Row Publ. v. Nation Enters., 471 U.S. 539, 558 (1985).

15. The Second Amendment has what might be a purpose limitation, but it does not grant a power to the federal

clauses give Congress "power to enforce [the amendment] by appropriate legislation."[16]

This Court has recently recognized the independent judicial scrutiny required by this textual formulation. First, this Court emphasized that it, not Congress, defines the Constitution's limiting words.[17] Second, this Court insisted that Congress is limited to enacting legislation aimed at the goal recited in the granted power.[18] Third, this Court

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government and has yet to be fully explicated by this Court. *See* Printz v. United States, 521 U.S. 898, 938 n.1 (1997) (Thomas, J., concurring) (mentioning Court's lack of analysis).

16. U.S. Const. Amends. XIII, XIV, XV, XVIII, XIX, XXIII, XXIV, XXVI. One also gives this power to the States. *See* U.S. Const. Amend. XVIII, sec. 2.

17. "The power to interpret the Constitution in a case or controversy remains in the Judiciary." City of Boerne v. Flores, 521 U.S. 507, 524 (1997); *see also id.* at 519 (basing limitation on Congress' power on words "enforce . . . provisions of this article"); *id.* at 545 (O'Connor, J., dissenting on other gds.) ("Congress lacks the power to decree the *substance* of the Fourteenth Amendment's restrictions on the States.") (citation and internal quotation marks omitted).

18. *See Boerne*, 521 U.S. at 519 ("Congress does not enforce a constitutional right by changing what that right is. . . . Were it not so, what Congress would be enforcing would no longer be, in any meaningful sense, the

independently checked Congress' factual record.[19] Fourth, this Court held Congress' power is limited to actions both congruent and proportionate with the constitutionally legitimate goal in light of the legislatively gathered facts.[20]

The textual parallels counsel doctrinal similarity.

First, this Court should itself define the constraining phrases: "limited times"[21] and "promote the progress of science and useful arts."[22]

Second, this Court should hold Congress to the one goal allowed by the Clause, "promot[ing] the progress of science and useful arts." Congress has already declared the CTEA primarily aimed at quite different goals:

'provisions of [the Fourteenth Amendment.]").

19. *See* Kimel v. Florida Bd. of Regents, 528 U.S. 62, 89 (2000) ("Our examination of the ADEA's legislative record confirms that Congress' 1974 extension of the Act to the States was an unwarranted response to a perhaps inconsequential problem.").

20. *See Boerne*, 521 U.S. at 520; *Kimel*, 528 U.S. at 644; United States v. Morrison, 529 U.S. 598, 625-26 (2000).

21. *See supra* at p.5 (discussing "limited times").

22. *See* Pollack, *What is Congress Supposed to Promote?*, *supra* note 2, at 28-36, 49-87 (providing empirical evidence on 1789 meaning of "progress").

> The purpose of the [CTEA] is to ensure adequate copyright protection for American works in foreign nations and the continued economic benefits of a healthy surplus balance of trade in the exploitation of copyrighted works. . . . [E]nsuring fair compensation for American creators . . . and providing enhanced economic incentives to preserve existing works. . . [23]

Accepting its own portrayal, Congress' two main goals were economic:[24] balance of trade and remuneration to "American creators." Facially, neither of these are intended to "promote[s] the progress of science and useful arts." To the extent the CTEA targets these announced goals, it is unconstitutional *per se*.

Third, promoting preservation of works, the remaining announced goal, must be subjected to some version of proportionality and congruence review based on this Court's independent perusal of the legislative record.[25] While unlabeled, the review level in *Kimel* and *Morrison* is clearly higher than mere rational basis review.[26]

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23. S. Rept. No. 104-315, at 4 (1996)(providing "purpose" of legislation).

24. Whatever the meaning of "promote the progress of science and useful arts," it cannot be either (i) raising the economic value of American copyright-protected goods, or (ii) providing a wealth transfer to certain individuals. The latter needs no explanation. As to the former, economic value is not independent of the legal entitlements granted by statute. *See* Julie Cohen, *Copyright and the Perfect Curve*, 53 Vanderbilt L. Rev. 1799, 1800 (2000). Economic value, therefore, cannot be the meaning of a textual constraint on Congress. Furthermore, Congress had no factual basis for believing a term extension would result in a net economic gain to Americans. Congress had a basis for believing that copyright holders with rights in some works would obtain greater profits. No evidence was introduced, however, about the value (economic or otherwise) of the unlicenced uses that would be blocked by term extension. Nor did Congress consider the greater fees Americans would have to pay for licenses to use non-American works inside the United States for an additional twenty-years. Copyright holders, furthermore, rely extensively on foreign-made copies of American works, thus limiting any American gain in the balance of payments. *See* Malla Pollack, *The Right to Know?: Delimiting Database Protection at the Juncture of the Commerce Clause, the Intellectual Property Clause and the First Amendment*, 17 Cardozo AELJ 47, 94-96 (1999) (discussing fudge of difference between "foreign sales" and "exports" in report submitted to Congress in support of the Digital Millennium Copyright Act).

25. The CTEA is facially disproportionate. The term enhancement is not limited to old works requiring costly (or any) physical repair before dissemination. No exemption is provided for persons who want to repair and disseminate old works but have tried and failed to locate the copyright holders whose permissions are required.

26. *See Kimel*, 528 U.S. at 81-92; *Morrison*, 529 U.S. at

B. Fear of Monopolies and Corruption Support Narrow Construction of the Power

Policy concerns important to the Framers and the ratifying generation support a high standard of review for congressional action pursuant to the Copyright and Patent Clause.

The Copyright and Patent Clause was drafted against the background of the English Statute of Monopolies[27] and

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619-627; *see also* Robert C. Post & Reva B. Siegel, *Equal Protection by Law: Federal Antidiscrimination Legislation after* Morrison *and* Kimel, 110 Yale L.J. 441, 477 (2000) ("restrictions [in *Morrison*] seem analogous to the narrow tailoring required by strict scrutiny.").

27. 21 Jam. 1, c.3 (1624). One of the exceptions to the Statute allowed grants "concerning printing." *Id.* at § 10. Like monopoly grants over other products, printing privileges were used both to motivate "private" persons to enforce government regulations and to reward Crown favorites indirectly. *See* Malla Pollack, *Purveyance and Power, or Over-Priced Free Lunch: The Intellectual Property Clause as an Ally of the Takings Clause in the Public's Control of Government*, 30 Southwestern Univ. L. Rev.1, at 92-99 (2000); *see also* Lyman Rae Patterson, Copyright in Historical Perspective 78-113 (1968) (discussing printing patents); Howard B. Abrams, *The Historical Foundation of American Copyright Law*, 29 Wayne L. Rev. 1119, 1147-52 (1983) (same).

the evils it attempted to control.[28] Public concern with "monopolies"[29] was not merely a fear of anticompetative economic behavior. It was a fear of government capture by special interests – in modern terms, "agency failure"; in Madison's diction, "faction"; in Whig rhetoric, "corruption."

During the ratification controversy, monopolies were denounced as the standard pay-off tool of a "corrupt oppressive aristocracy."[30]After all, everyone knew that

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28. *See* Graham v. John Deere Co., 383 U.S. 1, 5 (1966); *see also, e.g.*, Gordon S. Wood, The Creation of the American Republic 1776-1787, at 623 (paperback ed. 1998): Linda Levy Peck, Court Patronage and Corruption in Early Stuart England 220 (1990)(both asserting that fight against early Stuart corruption and related monopolies was central to revolutionary thought.); *see also* Brief Amici Curiae of Tyler T. Ochoa, Mark Rose, Edward C. Waltherscheid, the Organization of American Historians, and H-Law: Humanities and Social Sciences OnLine in Support of Petitioners (providing historical background supporting narrow reading of Copyright Clause).

29. "Monopoly" was a flexible term of disapproval applicable to almost any disliked trade regulation. *See* Pollack, *Purveyance and Power, supra* note 27, at 40-41.

30. George Mason, *The Objections of the Hon. George Mason to the Proposed Federal Constitution. Addressed to the Citizens of Virginia, reprinted in* Pamphlets on the Constitution of the United States 327, 332 (Paul L. Ford ed., 1968). Congruently, the Constitution doubly denies

"[e]xclusive companies are, in trade, pretty much like an aristocracy in government, and produce nearly as bad effects. . . . [S]uch companies . . . always by the greatness of their capital, have an undue influence on government."[31] "Monopolies in trade [may be] granted to the favorites of government, by which the spirit of adventure will be destroyed, and the citizens subjected to the extortion of the companies who have an exclusive right, to engross different branches of commerce."[32] As Thomas Paine had warned "the [English] crown is [the] overbearing part [of] the English constitution . . . deriv[ing] its whole consequence merely from being the giver of places and pensions . ..,"[33] places and pensions, furthermore, historically funded by monopolies and related methods of by-passing Parliamentary scrutiny of the

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government power to grant titles of nobility. *See* U.S. Const. Art. I, Sec. 9, cl. 8 (baring federal grants); *id.* at Sec. 10, cl. 1 (baring state grants).

31. Agrippa, 14 *To the Massachusetts Convention, reprinted in* 4 The Complete Anti-Federalist 104, 104-05 (Herbert J. Storing ed., 1981).

32. A Son of Liberty, *reprinted in* 3 The Complete Anti-Federalist 34, 35 (Herbert J. Storing ed., 1981).

33. Thomas Paine, Common Sense, *reprinted in* Thomas Paine, Selected Works of Thomas Paine & Citizen Tom Paine [by] Howard Fast 6, 10 (Modern Library ed. 1946).

royal fisc.[34]

The extent of the fear can only be understood by considering the extent of the corruption. The late Tudor and Early Stuart English monarchs lacked the man-power and revenue to control social and economic behavior through police or administrative agencies. Instead, regulation was imposed and funded indirectly though a maze of monopolies, fees, and special privileges.[35] The Stationers' Company, which controlled printers' claims to "copy-rights," was one such indirect form of rule, a trade guild which supported Crown censorship.[36]

While full figures are unavailable, the Long Parliament claimed that monopolies alone yearly "prejudice'd the subject" by over one million pounds.[37] The leading

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34. See, e.g., Pollack, *Purveyance and Power, supra* note 27, at 51, 56-57, 80-82, 89-92.

35 . *See* Pollack, *Purveyance and Power, supra* note 27, at 20-99, 119-33 (providing detailed explication and support). Corrupt, indirect funding of government services by privatizing those services included fee-paid officials (piece-work employees) and monopolists (independent contractors) *See id.* at 131.

36. *See, e.g,,* Patterson, *supra* note 27, at 114-142 (discussing interaction of Stationers' Company and Crown censorship); Abrams, *supra* note 27, at 1135-38 (same).

37. *The Grand Remonstrance [of 1641], with the Petition Accompanying It, reprinted in* The Constitutional

authority is noted British historian G. E. Aylmer,[38] who specialized in the indirect funding mechanisms of the early Stuarts. Aylmer's educated estimates for yearly intake by officials of the national government *from private citizens* (including fees, gratuities, and gifts, but not bribes) is between £277,000 and £373,000.[39] To put these figures in perspective, the Crown's own annual revenue at the time was about £618,000, out of which the Crown paid these same officials about £350,000 per year.[40] Yet Aylmer's figures of the cost of indirect government administration are much too low – they omit many important scams.[41]

To add insult to injury, these indirect methods of funding did not work well. That is, they did not work well at funding the public welfare-producing government projects

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Documents of the Puritan Revolution, 1625-1660, at 202, 211 (Samuel Rawson Gardiner ed., 3rd ed. rev. 1968).

38. *See especially* G. E. Aylmer, The King's Servants: The Civil Service of Charles I: 1625-1642 (1961) (discussed extensively in Pollack, *Purveyance and Power, supra* note 27).

39. *See* Aylmer, *supra* note 38, at 246 (estimating yearly average for 1620-1640).

40. *See* Aylmer, *supra* note 38, at 248-52, *discussed in* Pollack, *Purveyance & Power, supra* note 27, at 133.

41. *See* Pollack, *Purveyance and Power, supra* note 27, at 133.

they supposedly supported.[42] They did work well at providing financial rewards to Crown favorites without touching the treasury directly.[43]

The Whigs and their political decedents, the American Framers, attempted to control government by limiting government revenue to legislatively approved

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42. *See, e.g.*, Pollack, *Purveyance and Power, supra* note 27, at 31-32 (demonstrating that fee on tavern licenses failed to fund rebuilding of Dover haven); *id.* at 88 (briefly discussing corruption of persons' granted royal permission to enforce various regulatory statutes); *id.* at 91 (mentioning public outcry over failure of both Old Soapers and Clerk of the Market to perform their duties properly during reign of Charles I); *id.* at 120 n.704 (discussing that 1614-17 attempt to increase export of semifinished wool cloth by allowing it to be controlled by Alderman Cockayne almost destroyed England's foreign trade staple); *id.* at 124 n.720 (briefly reviewing horror story of Navy officials becoming rich while allowing ships to rot during reign of James I).

43. *See, e.g.*, Pollack, *Purveyance and Power, supra* note 27, at 32-33 (describing sums collected by officials from suitors to the Court of Wards during Elizabeth I's reign); *id.* at 35-38 (describing officials' take from purveyance system during Elizabeth I's reign); *id.* at 81-82 (summarizing methods used by officials to obtain private profit from royal lands during reign of Charles I); *id.* at 90 (mentioning peculations of £22,000 out of yearly budget of £77,630 for Charles I's household); *id.* at 121 n.705 (listing a few of the persons who used offices to became rich).

taxation, cutting off the hidden pseudo-taxes[44] which allowed Crown administration without representational control.[45] Hence, taxation without representation is tyranny. Hence, the Copyright and Patent Clause was uncontroversial during ratification *because the power was tightly cabined to prevent misuse*. Instead, the anti-monopoly rhetoric was aimed at the textually open Commerce Clause.[46]

In sum, to review copyright statutes with the same deference accorded mere economic regulation betrays the textually recorded policy concerns of the ratifying generation. Congress may be able to give bonuses to favored corporations or industries through the spending power, or tilt

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44. *See* Pollack, *Purveyance and Power*, *supra* note 27, at 132 & nn. 760, 761 (listing several authorities who recognize these costs as tax substitutes).

45. The Statute of Monopolies, at the time of the Framers, and for long afterwards, was famous as the first Whig victory over the royal prerogative during the fight for representational control of government and government finance. *See* Charles Howard McIlwain, Constitutionalism Ancient and Modern 138 (1940); Pollack, *Purveyance and Power, supra* note 27, at 2-7, 67-68.

46. *See* Malla Pollack, *The Multiple Unconstitutionality of Business Method Patents: Common Sense, Congressional Consideration, and Constitutional History*, 28 Rutgers Computer & Tech. L.J. 61, 108-18 (2002) (reviewing discussion of monopolies during constitutional ratification and drafting of the Bill of Rights); *see also*, Pollack, *Purveyance and Power*, *supra* note 27, at 99-116 (same).

Commerce Clause based administrative agencies into pro-big business postures, but it cannot hide such subsidies behind "public interest" copyright statutes. The Copyright Clause was carefully drafted to curtail exactly this option – the hidden pay-off tool of a corrupt, oppressive aristocracy.[47]

II. The Court Should Provide Clear Guidance to Congress

This Court's usual reticence on constitutional issues[48] is unsuitable for this case.

First, giving full deference to Congress' as a co-equal branch of government, Congress cannot follow the Constitution without this Court's teaching on what the document means. This Court has yet to explicate the Copyright Power— a Power which has reached enormous importance. Congress needs this Court's guidance.

Second, Congress has not responded to this Court's repeated statements that the Copyright and Patent Clause's purpose is to increase public access to knowledge and technology.[49] This Court has attempted to create a soft-

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47. Mason, *supra* note 30.

48. *See* Ashwander v. TVA, 297 U.S. 288, 341 (1936) (Brandeis, J., concurring) (listing situations in which Court should decline to reach constitutional issues).

46. *See, e.g.*, Campbell v. Acuff-Rose Music, Inc., 510 U.S. 569, 574-76 (1994); Fogarty v. Fantasy, 510 U.S. 517, 526 (1994); Feist Publications, Inc. v. Rural Tel. Svc. Co., 499 U.S. 340, 349, 354 (1991); Bonito Boats, Inc. v. Thunder Craft Boats, Inc., 489 U.S. 141, 146-48, 150, 151,

voiced dialogue. Since Congress has not listened, this Court should raise its voice to be heard.

Third, the current burgeoning of copyright-holder and patent-holder rights to exclude is fueled by what the Framers' and ratifiers of the Constitution would term "corruption," Madison would name "faction," and law and economics scholars would call "agency failure." Mere political process is institutionally incapable of motivating Congress to act in the public interest regarding the scope of intellectual property.[50] Perhaps such action is allowable normal politics

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157, 164-65, 167 (1989); Harper & Row Publishers, Inc. v. Nation Enters., 471 U.S. 539, 558, 563, 580, 589 (1985); Sony Corp. v. Universal City Studios, 464 U.S. 417, 429 (1984); Kewanee Oil Co. v. Bicron Crop., 416 U.S. 470, 480-81, 484 (1974); Goldstein v. Ca., 412 U.S. 546, 546, 555 (1973); Lee v. Runge, 404 U.S. 887, 890-93 (1971); Graham v. John Deere Co., 383 U.S. 1, 5-6, 9, 10 (1966); Great Atlantic & Pacific Tea Co. v. Supermarket Equip. Corp., 340 U.S. 147, 155 (1951); Fox Film Corp. v. Doyal, 286 U.S. 123, 127-28 (1932); Ware v. Winsor, 62 U.S. (21 How.) 322, 327-29, 330 (1858); Wheaton v. Peters, 33 U.S. (8 Pet.) 591, 654, 668 (1834); Shaw v. Cooper, 32 U.S. (7 Pet.) 292, 310 (1833); Pennock v. Dialogue, 27 U.S. (2 Pet.) 1, 13, 19, 21 (1829).

See, e.g., Dennis Karjala, *Copyright Protection of Operating Software, Copyright Misuse, and Antitrust*, 9 Cornell J.L. & Pub. Pol'y 161, 181-82 (1999)(discussing Congress' inability to lower copyright holders' entitlements); Mark A. Lemley, *The Constitutionalization of Technology Law*, 15 Berkeley Tech. L.J. 529, 532 (2000) (recognizing Congress' institutional problems in protecting

in other areas of federal regulation, but the Copyright and Patent Clause was written in reaction to similar corrupt English practices. In this one Clause, if nowhere else in the Constitution, the Framers clearly intended to disallow special interest legislation. This Court should so-instruct Congress.

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the pubic domain as the major catalyst of constitutionalization of copyright scholarship); Jessica Litman, *Revising Copyright Law for the Information Age*, 75 Or. L. Rev. 19 (1996)(detailed discussion of collective action failures); Jessica Litman, *Copyright Legislation and Technological Change*, 68 Or. L. Rev. 275 (1989)(same); Neil Weinstock Netanel, *Locating Copyright Within the First Amendment Skein*, 54 Stan. L. Rev. 1, 86 n.278 (2001)(summarizing collective action failure); William F. Patry, *Copyright and the Legislative Process: A Personal Perspective*, 14 Cardozo AELJ 139 (1996) (discussing personal experience with congressional response to special interests). Assuming that the willingness to spend large sums on lobbying signals a request in the public's economic interest is irrational. *See, e.g.*, Richard E. Baldwin & Frederic Robert-Nicoud, *Entry and Asymmetric Lobbying: Why Governments Pick Losers*, Nat'l Bur. of Econ. Res. Working Paper No. W8756 (asserting groups in economic decline spend more on lobbying) *available at* <http://www.ssrn.com> (visited Feb. 7, 2002), or from authors at baldwin@hei.unige.ch; f.l.robert-nicoud@lse.ac.uk; Akira Okada & Arno Riedl, *Reciprocity, Inefficiency and Social Exclusion: Experimental Evidence*, Tingergen Inst. Discussion Paper No. TI 99-044/1 (asserting exclusive coalitions result in large efficiency losses) *available at* <http://www.ssrn.com.> (visited Feb. 28, 2002).

CONCLUSION

For all the reasons discussed above, this Court should both (i) use a heightened standard of review for the Copyright Clause issues, and (ii) fully explicate the requirements imposed by the Clause.

Respectfully submitted:
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Malla Pollack, Esq.
Member of the Bar of the U.S. Sp. Ct.

Northern Illinois University
College of Law
Normal Road
DeKalb, IL 60115
815-753-1160

after June 20, 2002
University of Memphis
Cecil C. Humphreys School of Law
3715 Central Ave.
Memphis, TN 38152-3140
901-678-2421